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In the Supreme Court of the United States

OCTOBER TERM, 1943

ALLEN, POPE, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT  
OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

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(1)



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MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 47-60) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on January 3, 1944 (R. 60). The petition for a writ of certiorari was filed on February 10, 1944. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

**QUESTIONS PRESENTED**

The questions presented are:

1. Whether the Special Act of February 27, 1942, was properly construed below merely to direct the Court of Claims to enter judgment for the petitioner in an amount determinable by simple computation from data therein referred to.
2. Whether the Special Act as construed below, is constitutional.

**STATUTE INVOLVED**

The Special Act of February 27, 1942 (56 Stat. 1122) is set forth in the Appendix, pp. 9-10 *infra*.

**STATEMENT**

On December 3, 1924, petitioner entered into a contract with the United States to construct a tunnel for the supply of water for the District of Columbia, and completed the work in 1927. In the course of construction, certain cave-ins occurred over the tunnel arch, requiring petitioner to excavate the materials which caved in, and to fill the caved-in spaces with concrete, dry packing, and grout. The contract established a so-called "B" line as the limit beyond which petitioner would not be paid for excavation or filling, but the cave-ins required such work beyond the "B" line (76 C. Cls. 64, 76-77, 79). Contending that the cave-ins were due to misrepresentations by the Government and to its change of the plans by lowering the "B" line 3 inches and by omitting

timber lagging from the sidewalls of the tunnel, petitioner brought suit in the Court of Claims to recover damages in the amount of \$306,825.33 for the additional work (76 C. Cls. 64). Jurisdiction of the Court of Claims was invoked under Judicial Code, § 145 (1), 28 U. S. C. 250 (1), vesting the court generally with jurisdiction over contract claims against the United States.

After a full trial, the court made findings of fact and rendered an opinion dealing with the issues involved (76 C. Cls. 78). The court found that the cave-ins were not due to any misrepresentations by the Government; that the changes in plans were not in writing as required by the contract; and that the contract price agreed to be paid, and which in fact was paid, was intended to cover such extra excavations and filling. However, the court allowed recovery for several items totalling \$45,174.46 (76 C. Cls. 64, at 102). Petitioner made several motions for a new trial, all of which were denied (81 C. Cls. 658; 86 C. Cls. 18). A petition for a writ of certiorari was also denied (303 U. S. 654). The judgment recovered by petitioner was duly paid (R. 48).

In 1942, petitioner secured the passage of the Special Act of February 27, 1942. Section 1 purported to confer jurisdiction upon the Court of Claims "notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance, to hear, deter-

mine, and render judgment upon the claims of Allen Pope \* \* \* against the United States, as described and in the manner set out in section 2 hereof, which claims arise out of the construction by him" of a water supply tunnel in the District of Columbia.

Section 2 provided:

The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope \* \* \* for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely, for the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper "B" or "pay" line three inches, and as to omit the timber lagging from the side walls of the tunnel; and for the work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing.

Section 4 authorizes an application for a writ of certiorari to the Supreme Court.

Pursuant to this Act, petitioner instituted the present proceeding to recover an additional amount of \$162,616.80, representing the total charge at the contract unit prices for excavation and filling alleged not to have been paid for (R. 1-9). The United States filed a general traverse and additional testimony was taken. The Court of Claims, however, without making any additional findings of fact, dismissed the petition (R. 59). It construed the Special Act as ordering that court "to again decide this case, which it has once finally decided under its general jurisdiction, and to decide it for the plaintiff, and give him a judgment for an amount which simple computation based upon data referred to in the special act, will produce" (R. 50). Accordingly, it held the Special Act to be an unconstitutional encroachment by Congress upon the judicial function of the Court of Claims (R. 52-53). Judge Littleton dissented on the ground that the Act was merely an authorization by Congress to the Court of Claims to consider petitioner's claims in the light of waivers of various defenses and hence did not interfere with the proper judicial function of the court (R. 59-60).

#### **ARGUMENT**

The question whether Congress may direct the Court of Claims to reconsider a case already

finally disposed of by that court under its general jurisdiction, in a manner which leaves the court no choice but to enter judgment for the theretofore unsuccessful party in an amount determined by simple mathematical computation, is an important issue justifying review by this Court. The question involves the nature of the powers exercised by the Court of Claims.<sup>1</sup>

This Court will reach that issue, decided by the court below, only if it first construes the Special Act of February 27, 1942, as depriving the Court of Claims of jurisdiction to do anything but enter a judgment for the petitioner in a readily ascertainable amount. The statute is reasonably susceptible of that construction, which was the one adopted by the Court of Claims. In the court below, however, both parties took the position that the statute should be interpreted as vesting the Court of Claims with jurisdiction again to hear and determine petitioner's claims which that court had already decided against him, subject only to a waiver of the defenses of statute of limitations, *res judicata*, partial allowance and release, and that under the Special Act the Court of Claims was free to consider whether there was a legal basis for the asserted recovery, and was

<sup>1</sup> *Williams v. United States*, 289 U. S. 553; *Ex Parte Bakelite Corp.*, 279 U. S. 438; *United States v. Klein*, 13 Wall. 128; *Gordon v. United States*, 2 Wall. 561, 117 U. S. 697; *Pocono Pines Assembly Hotels Co. v. United States*, 73 Ct. Cls. 447.

not required merely to enter judgment for petitioner in an amount susceptible of simple mathematical computation.<sup>2</sup> We do not read the petition for certiorari (pp. 7-9) as taking a contrary position. The parties and the court below are in apparent agreement that the Act is valid if the interpretation put upon it by the parties below is correct.<sup>3</sup> If the parties were correct in their position that the Act should be construed so as to avoid the constitutional issue, this Court will not be called upon to decide the question of importance.

The question as to the construction of the Special Act is not, of course, of general significance. The Act here involved differs from the usual and familiar form of special jurisdiction statute which merely confers jurisdiction "to hear, determine, and render judgment" upon designated claims, occasionally with a waiver of specified defenses.<sup>4</sup> We have been able to find no other act with the additional provisions which raise the issues presented in this case.

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<sup>2</sup> See Brief for the United States in Court of Claims, pp. 81-96; Second Supplemental Brief for the United States, pp. 255 *et seq.*; Supplemental Brief for Petitioner, pp. 246-247.

<sup>3</sup> The parties were also in accord below that the statute would be invalid if given the construction which the Court of Claims adopted. See note 2, *supra*.

<sup>4</sup> See e. g., the acts involved in *De Luca v. United States*, 84 C. Cls. 217; *Alcock v. United States*, 74 C. Cls. 308; *Mack Copper Company v. United States*, 97 C. Cls. 451.

These considerations indicate that the Court may not be called upon to decide the constitutional issue which alone makes a case involving this unusual type of Special Act of any importance.\*

Respectfully submitted.

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MARCH 1944.

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\* If this Court should conclude, contrary to the views of the court below, that the Act constitutionally required the Court of Claims to make a non-judicial determination, it would be forced to dismiss the petition for certiorari, inasmuch as this Court itself has no jurisdiction to consider cases not of judicial cognizance. *Keller v. Potomac Electric Power Co.*, 261 U. S. 428.

## APPENDIX

The Special Act of February 27, 1942 (56 Stat. 1122), provides as follows:

### AN ACT

To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction be, and the same is hereby, conferred upon the Court of Claims of the United States, notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States, as described and in the manner set out in section 2 hereof, which claims arise out of the construction by him of a tunnel for the second high service of the water supply in the District of Columbia.*

SEC. 2. The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has received the use

and benefit; namely, for the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper "B" or "pay" line three inches, and as to omit the timber lagging from the side walls of the tunnel; and for the work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing.

SEC. 3. Any suit brought under the provisions of this Act shall be instituted within one year from the date of the approval hereof, and the court shall consider as evidence in such suit any or all evidence heretofore taken by either party in the case of Allen Pope against the United States, numbered K-366, in the Court of Claims, together with any additional evidence which may be taken.

SEC. 4. From any decision or judgment rendered in any suit presented under the authority of this Act, a writ of certiorari to the Supreme Court of the United States may be applied for by either party thereto, as is provided by law in other cases.